Supreme Court, U.S.
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No. 10-

IN THE

Supreme Court of the United States

NELSON GAITAN-AYALA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ERIC A. SEITZ
Counsel of Record
820 Mililani Street, Suite 714
Honolulu, Hawaii 96813
(808) 533-7434
eseitzatty@yahoo.com

Attorney for Petitioner
Nelson Gaitan Ayala

233659

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

1. Should the Ninth Circuit have applied the standard of materiality set forth in *Giglio v. United States*, 405 U.S. 150 (1972) rather than the standard set forth in *Brady v. Maryland*, 373 U.S. 83 (1963) when it found that the government withheld *Giglio* evidence?

2. Did the Ninth Circuit err by analyzing the sufficiency of the remaining evidence rather than analyzing the impact of the withheld evidence on petitioner's convictions to find the withheld evidence was not material when it could have been used to impeach a critical government witness whose testimony directly tied petitioner to the charged conduct?

3. Did the Ninth Circuit err by finding that the District Court overturned Counts 6, 11, and 12 for factual rather than legal insufficiency when the basis for overturning those Counts was a *Brady* violation?

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OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit issued a memorandum decision in this case which is appended to this petition. See App. at 1a-6a. The United States District Court for the District of Hawaii's Order Granting in Part and Denying in Part Defendant Nelson Gaitan-Ayala's Motion For A New Trial which is also appended to this petition. See App. at 7a-42a.

JURISDICTION

The Ninth Circuit initially issued its decision in petitioner's case on August 9, 2010. App. at 1a. Petitioner moved for reconsideration and rehearing *en banc*. App. at 43a. The Ninth Circuit filed its order denying reconsideration and rehearing *en banc* on September 17, 2010. See App. at 43a-44a. This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction to review the District Court's final judgment pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction in this criminal matter pursuant to 18 U.S.C. § 3231.

CONSTITUTIONAL PROVISION INVOLVED

"No person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V.

STATEMENT OF THE CASE

1. A jury convicted petitioner as charged on five counts of a First Superseding Indictment against petitioner and co-defendants. The jury convicted petitioner of conspiring to possess with intent to distribute and to distribute 500 grams or more of a substance containing a detectable amount of methamphetamine in violation of 21 U.S.C. § 846 under Count 1, distributing 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) on November 16, 2006 under Count 6, distributing 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) on March 23, 2007 under Count 7, using a communication facility in causing and facilitating the commission of a conspiracy to possess with intent to distribute and to distribute methamphetamine in violation of 21 U.S.C. § 843(b) on December 13, 2006 under Count 11, and using a communication facility in causing and facilitating the commission of a conspiracy to possess with intent to distribute and to distribute methamphetamine in violation of 21 U.S.C. § 843(b) on December 17, 2006 under Count 12.

2. At petitioner's trial Corey Kaowili was an essential witness for the government who directly tied petitioner to methamphetamine transactions and interpreted a number of recordings to incriminate petitioner. Kaowili testified that he purchased six pounds of methamphetamine from petitioner on November 16, 2007, and arranged to have an undercover police officer purchase one pound of methamphetamine from petitioner on March 23, 2007. App. at 8a, 28a.

Kaowili also provided testimony in which he purported to interpret a number of otherwise ambiguous recorded conversations to implicate petitioner in methamphetamine trafficking and the particular charged transactions. App. at 8a, 28a. The conversations which the District Court believed pertained to the March 23rd transaction all involved Kaowili and a co-defendant, and/or Kaowili and petitioner. App. at 8a, 13a-20a, 28a. Petitioner was never directly named in the conversations between Kaowili and the co-defendant, and Kaowili and petitioner never expressly discussed methamphetamine, ice, or drugs. App. at 8a, 15a-20a, 28a, 34a-39a. Kaowili and the co-defendant referred to an individual named "Uncle," and petitioner and Kaowili discussed chickens. App. at 15a-20a, 34a-39a. The co-defendant eventually discussed a "fight" with Kaowili and arranged a meeting at a location where the co-defendant sold methamphetamine to an undercover police officer. App. at 38a-39a.

Kaowili was cooperating with the government at the time of the charged transactions and testified that he was a reformed drug dealer who had given up dealing drugs as a way of giving back to the community. App. at 8a, 21a-22a, 26a-27a.

Petitioner presented evidence at trial that he was involved in raising and fighting chickens and that he had loaned Kaowili money. App. at 22a. The evidence at trial also showed that various individuals other than Petitioner could be referred to as "Uncle."

The jury was charged that it "must find that there is a plan to commit at least one of the crimes alleged in the First Superseding Indictment as an object of the conspiracy."

Following petitioner's convictions the government disclosed that it had withheld *Giglio* evidence that Kaowili bought large quantities of methamphetamine and cocaine at the very same time he was cooperating with the government, and that Kaowili had previously been apprehended at the airport carrying a significant sum of cash. App. at 22a-23a.

3. Petitioner filed a Motion for a New Trial based on the *Giglio* evidence which the District Court granted in part and denied, in part, finding that a new trial was warranted on Counts 6, 11, and 12, but not Counts 1 and 7. App. at 9a, 25a-42a. The District Court applied the standard of materiality set forth in *United States v. Bagley*, 473 U.S. 667 (1985) to petitioner's claim for a new trial in spite of characterizing the withheld evidence as "*Giglio* materials." App. at 22a-24a. The District Court found that the information concerning Kaowili's participation in narcotics transactions while he was working with the government would have been favorable to petitioner, significantly impeached Kaowili, damaged Kaowili's credibility in a way that the impeachment evidence known to petitioner did not, and "provided powerful and unique evidence that Kaowili was not only fabricating his status as a reformed drug dealer, but that he [also] deceived the government." App. at 25a-27a. The District Court summarily discounted withheld information concerning Kaowili's apprehension in 2002. App. at 26a-27a.

The District Court stated that Kaowili was generally a "significant witness" as he was involved in both of the charged methamphetamine transactions, interpreted the phone conversations for which petitioner was charged, and generally linked petitioner to the drug business. App. at 28a. The District Court found that Kaowili's testimony was critical to bring together the evidence implicating petitioner in counts 6, 11, and 12, App. at 28a-33a; however, the District Court found that there was otherwise sufficient evidence to support petitioner's convictions for counts 1 and 7. App. at 33a-41a.

4. Petitioner appealed the District Court's order affirming his convictions on Counts 1 and 7 to the Ninth Circuit. App. at 2a. The Ninth Circuit summarily concluded the petitioner waived any argument under the standard of materiality set forth in *Napue v. Illinois*, 360 U.S. 264 (1959) [or *Giglio*] by not raising that argument before the District Court, and analyzed materiality under the *Brady* standard. App. at 2a. The Ninth Circuit proceeded to review the evidence absent Kaowili's direct testimony to find the remaining evidence sufficient to convict petitioner of Counts 1 and 7. App. at 2a-4a. The recorded conversations Kaowili interpreted were crucial to the Ninth Circuit's decision, as it found that the co-defendant's sale of methamphetamine "sufficiently explained" those conversations pertained to methamphetamine. App. at 2a-3a. The Ninth Circuit failed to explain how those recordings would be introduced into evidence without Kaowili. The Ninth Circuit also found that petitioner's conviction on Count 1 for conspiracy should be upheld based on its implicit finding that Counts 6, 11, and 12

were reversed for factual, rather than legal, insufficiency. App. at 4a.

REASON FOR GRANTING THE PETITION

The Ninth Circuit's Decision Conflicts With the Decisions of this Court and other Courts of Appeals on the Same Important Matters or Federal Questions, So Far Departs From the Accepted and Usual Course of Judicial Proceedings, and/or Sanctions Such a Departure by the District Court to Call For this Court to Exercise Its Supervisory Power.

1. The Ninth Circuit erroneously applied the *Brady* standard of materiality in this case where the government indisputably withheld *Giglio* materials.

Brady and *Giglio* set forth different standards of materiality, as *Giglio* requires reversal when there is "any reasonable likelihood" the false testimony could have affected the judgment of the jury, *Giglio*, 405 U.S. at 154, whereas *Brady* requires reversal when there is a "reasonable probability" that the withheld evidence would have changed the result at trial. *United States v. Bagley*, 473 U.S. 667, 682 (1985). "[T]he fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." *Bagley*, 473 U.S. at 680. The different standard of materiality is justified by the fact that "the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, . . . a corruption of the truth-seeking function of the trial process." *Id.*; *see also Kyles v. Whitley*, 514 U.S. 419,

433 (1995) ("a conviction obtained by the knowing use of perjured testimony is fundamentally unfair"). The "principle that a State may not knowingly use false testimony to obtain a conviction—even false testimony that goes only to the credibility of the witness—is implicit in any concept of ordered liberty." *Bagley*, 473 U.S. at 680.

Kaowili presented perjured testimony when he claimed to be a reformed drug dealer, the government possessed contrary evidence prior to petitioner's trial, and the government did not correct Kaowili's perjured testimony. App. at 22a-23a, 26a-27a. In spite of finding that the withheld evidence in this case was *Giglio* material, the Ninth Circuit summarily ruled petitioner had waived any argument applying a *Giglio* standard of materiality by not raising the issue in the District Court. Petitioner raised the argument applying the *Giglio* standard of materiality in his Opening Brief to the Ninth Circuit and the government responded to this argument. The Ninth Circuit's finding of a waiver conflicts with the accepted and usual course of judicial proceedings, and the decisions of this Court and other Courts of Appeals. The Ninth Circuit is also sanctioning the District Court's departure for the accepted and usual course of judicial proceedings by applying the wrong standard of materiality to the facts of the present case.

There is a general rule that a federal appellate court will not consider an issue not passed upon below so that parties have the opportunity to offer evidence at the appropriate juncture; however, there are exceptions to this rule such as "where the proper resolution is beyond

any doubt, or where injustice might otherwise result." *Singleton v. Wulff*, 428 U.S. 106, 120-12 (1976). It is appropriate to find an exception for questions of law, and this Court has noted that "[a] rigid and undeviating judicially practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony" with the policy that "[r]ules of practice and procedure are designed to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. 552, 557-559 (1941); *see also United States v. Mendenhall*, 446 U.S. 544, 551 n. 5 (finding that the evidentiary record was sufficient to permit it to consider a newly raised issue).

The First Circuit has found exceptions to the general rule of waiver in cases where the omitted issue is purely legal and can be resolved on the existing record without further factual development, where the issue is of constitutional magnitude, where the argument is highly persuasive and not considering it will threaten a miscarriage of justice, where the opposing party will not suffer prejudice or inequity (because it has had adequate opportunity to brief and argue the issue), and/or where the omission seems inadvertent and yielded no tactical advantage. *Montalvo v. Gonzalez-Amparo*, 587 F.3d 43, 48-49 (1st Cir. 2009) (stating that it is not always clear whether a contention has been raised, as this can be a "matter of degree" where the party puts the relevant facts before the lower court); *National Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 627-628 (1st Cir. 1995). Other circuits also have adopted exceptions to the general rule where consideration of the issue is necessary to avoid manifest injustice or the issue is

purely legal and there is no need for additional fact-finding. *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 302 (2nd Cir. 1996); *United States v. The Barge Shamrock*, 635 F.2d 1108, 1112 (4th Cir. 1980); *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248, 250-251 (4th Cir. 1971); *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008) (also allowing for an exception in cases where the proper resolution of the new issue is clear beyond doubt); *Weitz Co., LLC v. Lloyd's of London*, 574 F.3d 885, 891 (8th Cir. 2009); *Princeton Homes, Inc. v. Virone*, 612 F.3d 1324, 1329 (11th Cir. 2010) (also allowing for an exception in cases where the proper resolution of the new issue is clear beyond doubt); *Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 990-991 (11th Cir. 1982) (noting that a court "must be mindful of our duty to apply the correct law"); *Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678, 686 (D.C. Cir. 2010). The Fifth Circuit provides that an argument is not waived if the argument on the issue before the district court was sufficient for that court to have ruled on the issue. *Bradley v. Allstate Ins. Co.*, 620 F.3d 509, 519 (5th Cir. 2010); *Brown v. Ames*, 201 F.3d 654, 663 (5th Cir. 2000).

In the present case the Ninth Circuit clearly should have analyzed petitioner's claim for a new trial under the *Giglio* standard of materiality, and its finding of a waiver was erroneous because the proper resolution of the issue was beyond doubt and the failure to resolve this issue resulted in injustice. The *Giglio* standard of materiality should have been utilized because the government knowingly used perjured testimony to convict petitioner. Applying the *Giglio* standard will not cause the government to be unfairly surprised or to

suffer prejudice or injustice because the government introduced all necessary evidence on this issue to the District Court and briefed and argued the issue in the Ninth Circuit. The facts before the District Court were sufficient for it to have applied the *Giglio* standard of materiality, and the issue of which standard to apply is purely legal and does not require the development of any additional facts. Furthermore, Petitioner's argument that the *Giglio* standard should apply is highly persuasive, raises constitutional questions, and petitioner's omission of the correct standard of materiality was an inadvertent omission by which he gained no tactical advantage. The Ninth Circuit's finding that petitioner waived the argument that his claim for a new trial should be analyzed under the *Giglio* standard of materiality conflicts with precedent from this Court and the other Courts of Appeal, departs from the usual course of judicial proceedings, and/or sanctions such a departure from the usual course of judicial proceedings to call for this Court to exercise its supervisory power.

2. The Ninth Circuit also erred by engaging in a sufficiency of evidence analysis to affirm petitioner's convictions under *Brady* when the withheld evidence was material because it could have been used to impeach a critical government witness whose testimony provided direct evidence of petitioner's guilt.

A showing of materiality does not require a demonstration by a preponderance that the disclosure of suppressed evidence would have resulted ultimately in the defendant's acquittal, as "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but

whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, *supra*, 514 U.S. at 434. This is "not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id.* at 434-435. "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within the general rule of *Brady*." *United States v. Bagley*, 473 U.S. 667, 677 (1985).

The Ninth Circuit departed from this Court's decisions and the usual course of judicial proceedings by analyzing the evidence other than Kaowili's testimony, including the ambiguous recorded conversations which Kaowili interpreted, to find the remaining evidence would have been sufficient to convict petitioner.

If the Ninth Circuit had engaged in the proper analysis and reviewed the impact of the withheld evidence on Kaowili's testimony and the government's case, then it would have found a reasonable probability that the withheld evidence would have impacted the outcome at trial. *See Kyles*, *supra*, 514 U.S. at 434-453. The District Court found Kaowili to be a significant witness for the government who was involved in both of the charged methamphetamine transactions, interpreted the recorded conversations, and linked petitioner to the drug business. 25a-28a. The District Court also found that the withheld evidence would have significantly impeached Kaowili and raised the issue of

whether he was deceiving the government at the time he was supposed to be a cooperating witness. 25a-27a. Petitioner could have used this evidence to cast doubt on the government's entire theory of the case, especially the recordings in which Kaowili participated and recorded. Petitioner could have argued that Kaowili provided the government with incomplete or intentionally misleading recordings, and that he was attempting to implicate petitioner in methamphetamine trafficking in order to protect his actual source of methamphetamine. In the recorded conversation between Kaowili and the co-defendant which immediately preceded the methamphetamine transaction, the co-defendant tells Kaowili that "Uncle told me he will talk...calling you." App. at 38a-39a. However, the government did not introduce any evidence of a call between Kaowili and Petitioner that occurred in the period between this recorded conversation and the methamphetamine transaction. Given those facts, it is clear that the withheld evidence raises a reasonable probability that the outcome of petitioner's trial would have been different. The Ninth Circuit did not address the facts that the recordings themselves are ambiguous, that the evidence at trial confirmed those ambiguities, and that the government would have had difficulty admitting the recordings into evidence without Kaowili.

The Ninth Circuit also sanctioned the District Court's departure from the usual course of proceedings in allowing that court to analyze particular items of evidence as immaterial, rather than assessing the withheld items cumulatively. *See Kyles*, *supra*, 514 U.S. at 440.

3. The Ninth Circuit also erred in affirming the conspiracy conviction in Count 1 by implicitly finding that the convictions which the District Court overturned due to the *Brady* violation were overturned for factual, rather than legal insufficiency.

A verdict must be set aside in cases in which the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. *Yates v. United States*, 354 U.S. 298, 312 (1957). In other words, "where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." *Griffin v. United States*, 502 U.S. 46, 54 (1991). A violation of either *Brady* or *Giglio* violates a defendant's right to due process and a fair trial. *Bagley*, *supra*, 473 U.S. at 677-680.

The District Court charged the jury that it could find any one of the crimes charged against petitioner as the object of the conspiracy. The jury could have found the predicate crime to be one of the counts which the District Court overturned due to the Brady violation, and those overturned convictions are constitutionally and legally, rather than factually, insufficient. The Ninth Circuit's contrary conclusion conflicts with precedent from this Court, departs from the usual course of judicial proceedings, and/or sanctions such a departure from the usual course of judicial proceedings so as to compel this Court to exercise its supervisory power.

CONCLUSION

In accord with the foregoing, this Court should grant this petition for a writ of certiorari.

DATED: Honolulu, Hawaii, December 16, 2010.

Respectfully submitted,

ERIC A. SEITZ
Counsel of Record
820 Mililani Street, Suite 714
Honolulu, Hawaii 96813
(808) 533-7434
eseitz.seitzoffice@yahoo.com

Attorney for Petitioner
Nelson Gaitan-Ayala

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 9, 2010

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-10286
2010 U.S. App. LEXIS 17011

August 9, 2010, Filed

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

NELSON GAITAN-AYALA,

Defendant - Appellant.

June 18, 2010, Argued and
Submitted Honolulu, Hawaii

JUDGES: Before: B. FLETCHER, PREGERSON and CLIFTON, Circuit Judges.

OPINION

MEMORANDUM

A jury convicted Appellant Nelson Gaitan-Ayala on five methamphetamine-related counts. When *Giglio*[1]

1. *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

evidence concerning government witness Corey Kaowili surfaced after trial, Gaitan-Ayala moved for a new trial on all counts. In a well reasoned order, the district court granted his motion except as to two counts: distributing 50 grams or more of methamphetamine (count 7), and conspiring to distribute 500 grams or more of methamphetamine (count 1). Gaitan-Ayala now appeals. He contends that the district court erred in sustaining those two counts, and that several trial errors combined with the suppression of impeachment evidence cumulatively rendered his trial unfair. We affirm.

I. Suppression of Impeachment Evidence

Gaitan-Ayala has waived any argument under *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), by failing to raise it before the district court. The suppression of impeachment evidence therefore can be analyzed only under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the standard Gaitan-Ayala argued to the district court. Under that standard we must order a new trial if the undisclosed evidence was "material" — that is, if "there is a reasonable probability that . . . the result of the proceeding would have been different" had the evidence been disclosed. *Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008) (quotation marks, citation, and emphasis omitted).

All agree that the government proved the March 23, 2007 methamphetamine sale to undercover police officer Keane Tabanera. The series of recordings the

government introduced created a strong chain of evidence that connected Gaitan-Ayala link by link to the March 23 sale. The existence of the sale makes clear that when Gaitan-Ayala spoke about chicken fighting during the recordings, he was using "chickens" as code for methamphetamine. The recordings also show that Gaitan-Ayala was involved in arranging the March 23 sale. In sum, the sale itself sufficiently explained what the recordings meant; there was no need for Corey Kaowili's testimony to interpret them.

There was other evidence linking Gaitan-Ayala to the methamphetamine distribution on March 23, 2007, and to methamphetamine trafficking more generally. Although Zaneta Nixon was impeached to some extent, she testified that on March 23, 2007, Hector Cruz had told her that Gaitan-Ayala had said to sell a pound of methamphetamine to Kaowili. Other government witnesses also testified to Gaitan-Ayala's involvement in drug trafficking. These witnesses also were impeached to a limited extent, but their testimony as a whole constitutes strong evidence that Gaitan-Ayala was involved in the March 23, 2007 deal. Because there is not a reasonable probability that the jury would have come to a different verdict on count 7 if the additional impeachment evidence had been disclosed, the evidence was not material to the conviction on count 7.

Neither was it material to the conviction on count 1, the conspiracy count. Count 7 was one of the overt acts charged in count 1, and thus the evidence that is sufficient to uphold count 7 is sufficient to uphold one

of the overt acts in count 1. Further, even if Kaowili's testimony is disregarded, the rest of the collective testimony from the government's witnesses constituted powerful evidence that Gaitan-Ayala had conspired with numerous persons to distribute more than 500 grams of methamphetamine.

Gaitan-Ayala argues that because the district court ordered a new trial on three substantive counts, all of which were charged as overt acts in count 1, the conviction on count 1 must be overturned. We disagree. If a conviction for one or more substantive crimes is overturned because of factual rather than legal insufficiency, but at least one substantive crime that is charged in the conspiracy has a sufficient factual basis, the conspiracy conviction must stand. *Griffin v. United States*, 502 U.S. 46, 56, 59, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991). Because one of the substantive crimes charged in count 1 has a sufficient factual basis — and because the undisclosed evidence did not materially affect the proof of the conspiracy itself — the conviction on count 1 must be sustained.

We note, however, that by failing to bring key impeachment evidence to the attention of the prosecutor, the federal law enforcement officers working on this case were guilty of a grave dereliction of duty and jeopardized the prosecution of the case. The government should take appropriate remedial or disciplinary action with its case agents to ensure effective internal communication, coordination, and responses to discovery obligations, and should also impress upon the

assistant U.S. attorneys that they must make sure that the case agents coordinate among themselves and keep the attorneys advised.

II. Cumulative Error

Gaitan-Ayala raises several other claims of error, arguing that these errors, combined with the suppression of impeachment evidence, cumulatively made his trial unfair and compel reversal. We respond to each.

1. No punitive intent "can be inferred from the nature of" Gaitan-Ayala's pretrial confinement. *Valdez v. Rosenbaum*, 302 F.3d 1039, 1045 (9th Cir. 2002). Gaitan-Ayala spent only a limited amount of time in the Special Housing Unit ("SHU"), and there was a reasonable relationship between his rotation through the SHU and the government's goal of preventing witness intimidation. *See id.* at 1046. Nor was the government required to be absolutely certain that witnesses were being intimidated before rotating Gaitan-Ayala though the SHU.

2. Admission of the gun photographs was not an abuse of the district court's "wide discretion" under Federal Rule of Evidence 403. *United States v. Layton*, 767 F.2d 549, 554 (9th Cir. 1985). Because police had found an indicium of drug-dealing, $37,000 in cash, near the gun, there was some nexus between the gun and drug-dealing. *Cf. United States v. Savinovich*, 845 F.2d 834, 837 (9th Cir. 1988). Moreover, the government

stressed not Gaitan-Ayala's mere possession of the gun but the fact that the gun was unregistered and lacked a permit. The government did not argue that the gun by itself showed that Gaitan-Ayala was involved in drugs. We cannot say that the district court abused its discretion in finding that the photographs' probative value was not "substantially outweighed" by the danger of prejudice or confusion. Fed. R. Evid. 403.

3. Gaitan-Ayala objected to the prosecutor's leading questions, and all of his objections were sustained. The government rephrased its questions. No error occurred in this respect.

4. Any prejudice from the two actual errors — the exclusion of Nathan Oandasan's prior statement and the interruptions of counsel's closing argument — was minimal. Oandasan was allowed to refresh his recollection by reading his previous inconsistent statement silently, and Gaitan-Ayala's attorney elicited impeaching testimony from him. Although the volume of the prosecutor's objections was inappropriate, the objections that the district court erroneously sustained affected the defense's closing argument very slightly if at all. Even when combined with the suppressed impeachment evidence, the cumulative effect of these trial errors was not "so prejudicial as to require reversal" of the convictions on counts 1 and 7. *United States v. Wallace*, 848 F.2d 1464, 1475 (9th Cir. 1988).

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII DATED APRIL 2, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CR NO. 07-00268-01 JMS

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT
NELSON GAITAN-AYALA'S
MOTION FOR A NEW TRIAL

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NELSON GAITAN-AYALA, (01)

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT NELSON GAITAN-AYALA'S MOTION FOR A NEW TRIAL

I. INTRODUCTION

On October 7, 2008, a jury trial commenced against Defendant Nelson Gaitan-Ayala ("Defendant") on five counts of the First Superceding Indictment ("FSI") including: (1) conspiring to possess with intent to

distribute and to distribute 500 grams or more of a substance containing a detectable amount of methamphetamine in violation of 21 U.S.C. § 846 (Count 1); (2) distributing 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) on November 16, 2006 (Count 6); (3) distributing 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) on March 23, 2007 (Count 7); (4) using a communication facility in causing and facilitating the commission of a conspiracy to possess with intent to distribute and to distribute methamphetamine in violation of 21 U.S.C. § 843(b) on December 13, 2006 (Count 11); and (5) using a communication facility in causing and facilitating the commission of a conspiracy to possess with intent to distribute and to distribute methamphetamine in violation of 21 U.S.C. § 843(b) on December 17, 2006 (Count 12).

In support of these Counts, the government called Corey Kaowili ("Kaowili"), who testified, among other things, that he purchased six pounds of methamphetamine from Defendant on November 17, 2006, and arranged to have an undercover police officer purchase one pound of methamphetamine from Defendant on March 23, 2007. Kaowili also explained numerous tape recordings of conversations between himself and Defendant and other co-conspirators which purportedly establish Defendant's involvement in these transactions. During the time of these transactions, Kaowili was cooperating with the government and testified that he had given up dealing drugs as a way of giving back to the community.

Appendix B

On October 17, 2008, the jury found Defendant guilty on the five Counts of the FSI. Assistant U.S. Attorney Susan Cushman ("AUSA Cushman") later filed three "Notices of Newly Discovered Giglio Material" which disclosed that after the trial she learned of evidence that while cooperating with the government in 2007, Kaowili purchased several kilograms of cocaine and five pounds of methamphetamine, and in 2002, the Drug Enforcement Administration ("DEA") recovered $19,680 from Kaowili at the Honolulu International Airport. Doc. Nos. 583, 599, 608. Consequently, Defendant filed his Motion for a New Trial due to this late-disclosed evidence. Based on the following, the court finds that the government's failure to disclose this information warrants a new trial on some of the Counts of the FSI and therefore GRANTS IN PART and DENIES IN PART Defendant's Motion for a New Trial.

II. BACKGROUND

A. The Trial

Trial commenced on October 7, 2008 and after five days of testimony, the jury returned a verdict against Defendant on all Counts of the FSI on October 17, 2008. The evidence presented is summarized as follows:

1. *The Government's Evidence*

During trial, the government presented testimony and evidence to support their contention that Defendant was involved in the transport and sale of methamphetamine on Oahu between 2005 and 2007.

For example, Edward Tufele ("Tufele") testified that he met with Defendant in 2005 so that Tufele could assist in the transport of methamphetamine from Las Vegas to Hawaii by canning the methamphetamine in metal cans. Doc. No. 588, Trial Tr. 2-17-24. Tufele testified that he subsequently canned methamphetamine on two separate occasions and placed the canning machine in storage in Las Vegas before his December 2005 arrest. *Id.* at 2-124-31; *see also* Pl.'s Exs. 2 (rental agreement for storage unit), 21 (flight information for Tufele).

Nathan Oandasan ("Oandasan"), Zaneta Nixon ("Nixon"), and Regina Costales ("Costales") provided further details of the operation on Oahu. Oandasan testified that he received methamphetamine from Las Vegas, dropped it off to dealers in Hawaii, collected the money, and sent the money to Las Vegas. *See* Doc. No. 588, Trial Tr. 2-187-88. Oandasan further testified that he reported to John Ayala and Hector Cruz ("Cruz"), and was told that Defendant was the "boss." *Id.* at 2-191. Oandasan and Nixon both testified about receiving methamphetamine through the mail which was packaged in metal cans, *id.* at 2-187-88; Doc. No. 589, Trial Tr. 3-147; and Oandasan, Nixon, and Costales all testified regarding their travels to Las Vegas to transport proceeds from the drug sales to Defendant in Las Vegas. They explained that Defendant personally met each of them at the airport and collected the money. Doc. No. 588, Trial Tr. 2-194 -200; Doc. No. 589, Trial Tr. 3-63-69, 3-151-52; Pl.'s Exs. 23 (flight information for Oandasan, Costales and Nixon), 25 (hotel information Oandasan, Costales and Nixon).

The government also presented testimony that Defendant (1) checked on the status of the Oahu portion of the drug operation by calling Oandasan and Costales, Doc. No. 588, Trial Tr. 2-192; Doc. No. 589, Trial Tr. 3-82; (2) came to Oahu in September 2006 for less than 24 hours purportedly to collect money from Oandasan, Doc. No. 588, Trial Tr. 2-201-02; Pl.'s Ex. 23 at 81, 83 (flight information for Defendant); (3) was aware he was under surveillance, Doc. No. 589, Trial Tr. 3-162-63; Doc. No. 590, Trial Tr. 4-55; Pl.'s Ex. 61; and (4) spoke to a paid informant, who testified that Defendant was interested in a possible deal to transport drugs to Atlanta. Doc. No. 589, Trial Tr. 3-206-09. Nixon further testified that she visited Defendant in Las Vegas in November 2006 and told him that she was short on paying for the methamphetamine she had already received. Defendant assured her that she would still receive methamphetamine to sell, and Nixon received additional methamphetamine shortly thereafter. Doc. No. 589, Trial Tr. 3-151-52.

Testimony and evidence was also admitted regarding methamphetamine deals in November 2006 and March 2007. Kaowili testified that he spoke with John Ayala and Raychel Cabral ("Cabral") in 2006 about a transaction in which he would pay Defendant for six pounds of methamphetamine. Doc. No. 590, Trial Tr. 4-64. Kaowili gave a tracking number for a package to Federal Bureau of Investigations ("FBI") Special Agent Gary Byrd ("Special Agent Byrd"), who intercepted a package containing two sealed cans with methamphetamine on November 17, 2006. Doc. No. 590,

Trial Tr. 4-19; Pl.'s Exs. 26-31, 35A. On November 19, 2006, Defendant arrived on Oahu (again, for less than 24 hours), *see* Pl. 's Ex. 23 at 88; and Kaowili testified that Defendant told him to pay Cabral for the methamphetamine. Doc. No. 590, Trial Tr. 4-65-66. Subsequently, the FBI provided money to Kaowili to pay Defendant through Ayala and Cabral on December 7, 2006, December 17, 2006, and December 21, 2006, Doc. No. 590, Trial Tr. 4-23-28; Pl.'s Exs. 36-38, and mailed money on January 26, 2007. Doc. No. 588, Trial Tr. 2-58-59; Pl. 's Ex. 39.

The government further presented telephone recordings intercepted by the FBI between John Ayala and Cabral and Defendant around the dates of some of these payments which purportedly discuss Kaowili paying for the methamphetamine. On December 13, 2006, John Ayala told Defendant that he spoke with the "pretty one," who Defendant clarified was the "long hair one." Pl.'s Ex. 57A. John Ayala explained that this individual was going to "put something together for this weekend" and had previously tried to reach Defendant because he had "something" for Defendant. *Id.* At this time, Kaowili had long hair at least to his mid-back. Doc. No. 588, Trial Tr. 2-57-58.

On December 17, 2006, the same day the FBI gave Kaowili $10,000 to pay Cabral, Cabral called John Ayala and informed him that "he only gave me ten" and that she "gotta wait I guess Friday." Pl.'s Ex. 58. In a later conversation that same day between Defendant and John Ayala, Defendant told John Ayala to call "the long

haired guy" and ask what is going on because "the people have already bought the stuff." Pl.'s Ex. 59A. Defendant further told John Ayala:

> Call him now. Ask him: What's up? Because it's been now, now, now . . . it's a lot of bull shit man. He's done it to me before . . . last time, you remember all the mess I made with all the people. They were waiting and spending a lot. This is no game for us to go back forth. You went over there and now back again. You understand me? Hey, be firm . . . I'm just getting on my way over there right now, but call him right now.

Pl.'s Ex. 59A.

Beyond this evidence, Kaowili explained several taped conversations he had with Defendant, Cabral, and John Ayala in which the parties never directly used the words "drugs," "methamphetamine," or "ice," and at times instead talked about "derbies," "roosters" and "cars." *See, e.g.*, Pl.'s Exs. 62-66. For example, Kaowili explained that the following November 7, 2006 conversation with John Ayala was regarding sending methamphetamine to Oahu:

> Kaowili: . . . Remember, I told you, my friend going take care da . . . we just, we just do 'em the old way. I going give you the address. You send me up 2 or 3. And then I going da kine send you back the

money with my money. You know what I mean?

John Ayala: Okay. Yeah.

Pl.'s Ex. 63; *see also* Doc. No. 590, Trial Tr. 4-90.

Kaowili also explained that the following March 19, 2007 conversation with Defendant discussing a debt on an "old car" was really about his payment for the six pounds of methamphetamine:

Kaowili: He said about the, the, the, old, the old, the old, you know that old bill I owe.

Defendant: Yeah I know on the old car we have, used to have, yeah.

Kaowili: Yeah, umm, I only owe '8' on that, but he was telling me for let you know, that you know something.

Defendant: Um-hum.

Kaowili: I was sending the money, and da kine came up and got the money.

Defendant: Oh good, OK, how much, how much ...

Kaowili: I owe $8,000 more on it.

Defendant: And how much you give to him?

Kaowili: I gave them, the last one, remember, remember we, we agreed just pay for what the thing was, for the six of them?

Defendant: Oh yeah . . . .

Pl.'s Ex. 70; *see also* Pl.'s Ex. 65.

Regarding the March 2007 transaction, Kaowili introduced an undercover Honolulu police officer, Officer Keane Tabanera ("Tabanera"), to Cruz to purchase one pound of methamphetamine. Tabanera testified that he met Cruz on March 14, 2007, but because the "chickens" (as Cruz referred to it), had not arrived yet, they had to meet again on another day. Doc. No. 590, Trial Tr. 4-148-49.

Kaowili then had a series of conversations with Cruz and Defendant during the evening hours of March 19, 2007. In the first conversation, Cruz tells Kaowili to speak with "Uncle," Defendant's nickname:

Cruz: (unintelligible) . . . alright-alright, here we go, OK, you know what, um, I would like you talk to uncle you know that way (unintelligible) we clear, make it clear, that shit, you know what I mean? And then um, especially, explain him everything, you know, explain him what's up and everything, you know, that's all I want and after-after-after

he pau[1] talk to you, he going to call me back, then I call you back, oh (unintelligelbly) to you, OK?

Kaowili: OK.

Ex. 69.

That same day, Kaowili then had the following conversation with Defendant:

Defendant: . . . . so do you want to still fight roosters?

Kaowili: Yeah, yeah. (unintelligible) I told them the plan, and I told him you know now now, I spoke to you cousin[2] down here about how we going to fight chicken and he kinda agrees with it, I going to purchase one, I going to introduce, introduce him to my cousin, and from there, we going to work things out from there, instead of me, you know, you know what I mean?

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1. In Hawaiian, "pau" means "[f]inished, ended, through, terminated, completed, over, all done; final, finishing; entirely, completely, very much; after; all, to have all; to be completely possessed, consumed, destroyed." Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary (Univ. of Haw. Press 1986).

2. Cruz is related to Defendant by marriage. Doc. No. 591, Trial Tr. 5-116.

Defendant: Yeah?

. . .

Kaowili: I got to build, because I, I, I like be, I going to be involved, but I going to be out of sight, I going to overlook the situation, you know what I mean?

Defendant: Um hum.

. . .

Defendant: Go, go and talk, yeah go and talk to him, and you guys define the plan how you going to fight the chickens, and then he's going to let me know, you know, and um, I, I'm here, I take care of them here, I doing my part here, you know like now we going to be straight um, you know any problem understand, you call me this phone, right now here, that you have right now, call me up, it's going to be um, only in like night time.

Kaowili: Oh, night time, this number?

Defendant: Yeah, like night time I either call you, you know, after, after six seven from here you can call me, because I want to keep it off in the daytime, and you know.

Kaowili: OK, OK, I talk to him, I don't know (unintelligible) um are we still fighting the um chickens on Wednesday, or the derby got delayed?

Defendant: Wednesday is (unintelligible) yeah, yeah, should be (unintelligible) or like, I believe it going to be Wednesday. Talk to him tomorrow, you guys can talk to that cousin, and I can, I going to go talk to him, and then from, from that you guys can just, you know, decide what you guys going to do there.

Pl.'s Ex. 70.

After Kaowili spoke with Defendant, on that same day, Cruz called Kaowili and left the following message:

Cruz: Hey bro, I think that everything is-is alright now, I mean um, I mean you talked to him already so it's going to be cool, so um, I give you a call Wednesday to see what's up, OK? Let see if we go buy some chickens or something . . . .

Ex. 71.

On Wednesday, March 21, 2007, Kaowili and Cruz met, but no transaction occurred due to "trouble" in Mexico:

Cruz: Um. We being here lately, we have a little trouble because you know, that they fucked up in Mexico. You know, the government.

Kaowili: Uh.

Cruz: (unintelligible) like I said. But uh, the deal right now is that the thing is on the way now.

Kaowili: No kidding. Okay.

Cruz: It's on the . . . it's on the way of for you now. Okay so, I just going call you. Uncle told me, he will talk . . . calling you . . .

Pl.'s Ex. 72.

Cruz then arranged for a meeting on Friday, March 23, 2007 at the Zippy's restaurant in Wahiawa, Oahu:

Kaowili: So where we going fight, though? When we going fight with Larry?

Cruz: Saturday. Uh Friday. Friday for sure.

Kaowili: For sure.

Cruz: But the other hundred percent, for sure Friday.

Kaowili:	No meet someplace else or you know too much time.
Cruz:	Okay. Okay, I know. So what we gonna do.
Kaowili:	So I going call you, and I . . .
Cruz:	Let's meet at Zippy's Wahiawa.

Id.

On Friday, March 23, 2007, Tabanera met Cruz at the Zippy's restaurant in Wahiawa and received one pound of methamphetamine in exchange for $25,000. Doc. No. 590, Trial Tr. 4-151-54; Pl.'s Exs. 43, 44A, 74. On this same day, Nixon received a pound of methamphetamine from Cruz, who told her that "Uncle" told him to sell the other pound to Kaowili. Doc. No. 589, Trial Tr. 3- 156-57.

On June 7, 2007, a search warrant was executed on Defendant's residence in Las Vegas, where agents recovered $25,000 from Defendant's bedroom closet, $10,000 in a cowboy boot, $2,000 from a bedroom drawer, and a .357 magnum pistol from the nightstand table. Doc. No. 589, Trial Tr. 3-189-91; Doc. No. 591, Trial Tr. 5-48-49; Pl.'s Exs. 46-53.

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Appendix B

2. ***Defendant's Evidence***

On cross examination, Defendant impeached each of Plaintiff's cooperating witnesses to some degree. For Oandasan, Nixon, and Costales, Defendant raised that they are all long-time drug users, are seeking lower sentences by assisting the government, and did not disclose Defendant's alleged involvement in their drug dealings during their initial interviews with the government. On cross examination, Kaowili testified that he started taking drugs in the sixth grade, stole to support his habit, and then began selling drugs in intermediate school. Doc. No. 590, Trial Tr. 4-114-15. Kaowili openly admitted that by 2001, he was selling two to three pounds of methamphetamine a week. *Id.* at 4-115-16. Kaowili explained, however, that he stopped selling drugs once he began cooperating with the government:

> Q. And when you agreed to cooperate with the government, basically you were trying to save yourself; right?
>
> A. I mean I just was doing what I felt was the right thing to do.
>
> Q. And the right thing was to save yourself from going to prison for life; right?
>
> A. Save everybody else, giving back to the community and the younger kids, less dope to the island.
>
> . . .

> Q. How were you going to give back to the community?
>
> A. My way of giving back and to the kids, I mean the younger generation: one less main supply of bringing dope to the islands.

Id. at 4-117. As a result of his cooperation, Kaowili received a greatly reduced sentence of 46 months, well below the ten-year mandatory minimum. *Id.* at 4-110. The government also had the option of filing a further motion for downward departure. *Id.* at 4-111-13.

Defendant also called several witnesses. Erika Gaitan, Defendant's daughter, testified that Defendant ran a legitimate car repair business, was actively involved in rooster fighting, and was not, to her knowledge, involved in drugs in any way. *See generally* Doc. No. 491, Trial Tr. 5-78-86. She further explained that the gun found in the house was her mother's and that Defendant kept cash in the house for his car business and to gamble. *Id.* at 5-80-81. John Ayala, who pled guilty to drug charges, testified that his uncle, Defendant, was not involved in any of John Ayala's drug activities and that Defendant had loaned money to Kaowili, who had difficulty repaying Defendant. *Id.* at 5-99-101.

B. The Government's Post-Trial Giglio Disclosures

On December 19, 2008, the government filed its "Notice of Newly Discovered Giglio Material," which

disclosed a statement made prior to Defendant's trial by Holokai Mateialona ("Mateialona") that he sold several kilograms of cocaine to Kaowili while he was cooperating with the government in 2007. Doc. No. 583. On February 2, 2009, the government filed its "Supplemental Notice of Newly Discovered Giglio Material," which disclosed another statement made prior to Defendant's trial by Mateialona that he delivered five pounds of methamphetamine to Kaowili in March 2007. Doc. No. 599. Finally, on March 17, 2009, the government filed its "Second Supplemental Notice of Newly Discovered Giglio Material," which disclosed that DEA Special Agent Richard Jones recovered $19,680.00 from Kaowili at the Honolulu International Airport on August 15, 2002. Doc. No. 608.

During a March 19, 2009 hearing, AUSA Cushman provided a proffer, explaining that the Mateialona material was not intentionally withheld, but was not disclosed due to errors in cross-referencing files. The parties agree that there is no evidence of any intentional withholding of any of the *Giglio* materials, but that the government did act negligently.

III. STANDARD OF REVIEW

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "*Brady* encompasses impeachment evidence as well as exculpatory evidence." *United States v.*

Antonakeas, 255 F.3d 714, 725 (9th Cir. 2001); *see also Giglio v. United States*, 405 U.S. 150 (1952). In order to prevail on a *Brady* claim, a defendant *United States v. Jernigan*, 492 F.3d 1050, 1053 (9th Cir. 2007) (*en banc*); *see also Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Kyles v. Whitley*, 514 U.S. 419, 433 (1995).

Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985); *see United States v. Ross*, 372 F.3d 1097, 1107 (9th Cir. 2004) ("Evidence is material and favorable if there is a reasonable probability that the disclosure of the evidence would have changed the trial's result."). "A defendant need not show that she would more likely than not have received a different verdict with the evidence." *Jernigan*, 492 F.3d at 1054 (internal quotation marks omitted). Rather, a defendant "need only show 'that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at 1054 n.7 (quoting *Kyles*, 514 U.S. at 435).

The court must analyze the withheld evidence in context of the entire record and "undertake a careful, balanced evaluation of the nature and strength of both the evidence the defense was prevented from presenting and the evidence each side presented at trial." *Id.* at 1054 (internal quotation marks omitted).

Appendix B

IV. DISCUSSION

The parties do not dispute that the evidence at issue -- that Kaowili purchased several pounds of methamphetamine and cocaine in 2007 and was stopped at the Honolulu International Airport in 2002 with $19,680 -- was not disclosed until after the jury verdict. Further, this evidence is clearly favorable to Defendant as impeachment evidence of Kaowili. Accordingly, the relevant issue is whether this evidence is material, *i.e.*, whether this evidence puts the case in such a different light as to undermine confidence in the verdict. The government argues that this evidence is cumulative of the other impeachment evidence available to Defendant such that a new trial is not warranted. In comparison, Defendant argues that this late-disclosed evidence requires a new trial on all counts of the FSI because it directly contradicts Kaowili's testimony as a completely reformed drug dealer and Kaowili was the only witness to affirmatively link Defendant to the five Counts of the FSI. Def.'s Mot. 7.

The court first addresses whether the impeachment evidence is cumulative, and, finding that it would have significantly impeached Kaowili, analyzes the significance of his testimony to the government's case.

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Appendix B

A. Whether the Impeachment Evidence Is Cumulative

In general, impeachment evidence is cumulative and not material where it "merely duplicate[s] grounds for impeaching [the witness] that were actually presented to the jury." *Barker v. Fleming*, 423 F.3d 1085, 1096 (9th Cir. 2005). The court must view the withheld evidence in the context of the entire record. *See Kyles*, 514 U.S. at 460.

On cross examination, Defendant impeached Kaowili by raising, among other things, that Kaowili was hoping to reduce his sentence by cooperating with the government and sold two to three pounds of methamphetamine a week for years. Evidence that the government seized approximately $20,000 in 2002 is merely additional evidence of Kaowili's admitted drug dealing during this same time period and therefore does not provide "the defense with a new and different ground of impeachment." *Silva v. Brown*, 416 F.3d 980, 989 (9th Cir. 2005).

Evidence that Kaowili continued to receive large amounts of drugs *after* he started cooperating with the government, however, is very different than the impeachment evidence presented at trial. On the stand, Kaowili portrayed himself as a completely reformed drug dealer -- he testified that once he began cooperating with the government he stopped selling drugs as a way to give back to the community and the "kids." Indeed, by openly admitting to his extensive involvement in the

Hawaii methamphetamine trade, Kaowili actually bolstered that he was now telling the truth. Evidence that Kaowili continued to deal drugs would have provided powerful and unique evidence that Kaowili was not only fabricating his status as a reformed drug dealer, but that he deceived the government. Thus, this evidence would certainly have damaged Kaowili's credibility in a way that the impeachment evidence known to Defendant did and could not. *See Benn*, 283 F.3d at 1055 ("The mere fact that a prosecution witness has a prior record, even when combined with other impeachment evidence that a defendant introduces, does not render otherwise critical impeachment evidence cumulative."); *United States v. Brumel-Alvarez*, 976 F.2d 1235 (9th Cir. 1992), *amended and superseded on other grounds by*, 991 F.2d 1452, 1463 (9th Cir. 1993) (finding a *Brady* violation where the government withheld evidence that an informant made false claims to the government because the "[e]vidence that he lied during the investigation . . . would be relevant to his credibility and the jury was entitled to know of it"). Accordingly, the court concludes that the withheld evidence regarding Kaowili's purchase of cocaine and methamphetamine would have created additional doubt as to Kaowili's credibility.

B. Significance of Kaowili's Testimony to Each Count

Because the withheld impeachment evidence would have created additional doubt as to Kaowili's credibility, the court must analyze the significance of his testimony

to the government's case. *Benn*, 283 F.3d at 1059. In general, Kaowili was a significant witness for the government -- Kaowili was involved in the November 17, 2006 and March 23, 2007 drug deals and interpreted telephone conversations which purportedly link Defendant to these transactions and the drug business in general. Further, the other cooperating witnesses, Tufele, Oandasan, Costales, and Nixon, were all impeached to some degree. The court therefore performs a careful analysis of each Count of the FSI to determine whether the withheld evidence is material.

1. ***Counts 6, 11, and 12***

The court finds that Kaowili's testimony was significant for Counts 6, 11, and 12 of the FSI such that the withheld impeachment evidence puts these Counts in such a different light as to undermine the court's confidence in the jury's verdict.

Regarding Count 6, distribution of 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) on November 17, 2006, Kaowili testified that: (1) he spoke with John Ayala and Cabral about a transaction in which he would pay Defendant for six pounds of methamphetamine, Doc. No. 590, Trial Tr. 4-64; (2) after the six pounds arrived on November 17, 2006, Defendant came to Kaowili's house and told him to pay Cabral, *id.* at 4-65-66; and (3) he and Defendant and John Ayala discussed this transaction and Kaowili's resulting debt in coded conversations that were recorded by the FBI. *See, e.g., id.* at 4-89-94. The remaining evidence establishes that (1) the FBI received

from Kaowili the tracking number for a package from Las Vegas and found that it contained two sealed cans holding methamphetamine, *id.* at 4-19; Pl.'s Exs. 26-31, 35A; (2) the FBI provided money to Kaowili to pay for the six pounds of methamphetamine, Doc. No. 590, Trial Tr. 4-23-28; Pl.'s Exs. 36-38; (3) Defendant traveled to Hawaii on November 19, 2006, Pl.'s Ex. 23 at 88; and (4) Kaowili and Defendant had telephone conversations after Kaowili received the methamphetamine. Pl.'s Exs. 64, 65, 70.

Looking at the entirety of the evidence, it appears that Kaowili's testimony was critical in bringing together all of the evidence to implicate Defendant in this transaction. Without Kaowili's testimony, there is no evidence that directly and/or contemporaneously links Defendant to the November 17, 2006 transaction. Setting aside Kaowili's testimony, the closest evidence tying Defendant to this transaction is the phone conversations after the fact, but they were not contemporaneous with the alleged drug deal and were ambiguous without anyone to explain their meaning.[3]

3. For example, Kaowili testified that in the following conversation, Defendant told Kaowili to pay Cabral for the six pounds of methamphetamine and that he was willing to ship more drugs once payment is completed:

> Kaowili: Ah, what, what, I give the, I give the tickets to da kine's girl? Raychel?
>
> Defendant: Yeah, yeah, yeah. You know, when, when you ready, you let me know . . . .

Pl.'s Ex. 64; Doc. No. 590, Trial Tr. 4-91-92.

(Cont'd)

At most, these tape recordings establish that Kaowili owed Defendant money, and indeed, John Ayala testified that Defendant had loaned Kaowili money. Doc. No. 590, Trial Tr. 5-99-101. While it is true that the tape recordings and Defendant's quick trip to Oahu are

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(Cont'd)

Kaowili further testified that a March 19, 2007 conversation with Defendant regarding a debt on an "old car" was really about his payment for the six pounds:

Kaowili:	He said about the, the, the, old, the old, the old, you know that old bill I owe.
Defendant:	Yeah I know on the old car we have, used to have, yeah.
Kaowili:	Yeah, umm, I only owe '8' on that, but he was telling me for let you know, that you know something.
Defendant:	Um-hum.
Kaowili:	I was sending the money, and da kine came up and got the money.
Defendant:	Oh good, OK, how much, how much . . .
Kaowili:	I owe $8,000 more on it.
Defendant:	And how much you give to him?
Kaowili:	I gave them, the last one, remember, remember we, we agreed just pay for what the thing was, for the six of them?
Defendant:	Oh yeah . . . .

Pl.'s Ex. 70; *see also* Pl.'s Ex. 65.

suspicious, the court cannot say with any confidence that had Kaowili been impeached with the withheld evidence, a jury still would have concluded from this evidence that Defendant was involved with the sale of six pounds of methamphetamine.

The court also finds that Kaowili's testimony was integral to Counts 11 and 12, using a communication facility in the commission of a conspiracy to possess with intent to distribute and to distribute methamphetamine on or about December 13, 2006 and December 17, 2006, respectively. The government put forth evidence that at the time of these calls Kaowili was paying money to Cruz and Cabral for the six pounds of methamphetamine that the FBI received on November 17, 2006. *Id.* at 4-23-28; Pl.'s Exs. 36-38. In a phone call intercepted by the FBI on December 13, 2006, John Ayala told Defendant that he spoke with the "pretty one," purportedly Kaowili, Doc. No. 588, Trial Tr. 2-57-58, and that this individual was going to "put something together for this weekend" and had previously tried to reach Defendant because he had "something" for Defendant. Pl.'s Ex. 57A.

On December 17, 2006, Special Agent Byrd gave Kaowili $10,000 to pay to Cabral. Pl.'s Ex. 37; Doc. No. 590, Trial Tr. 4-24. Cabral called John Ayala and informed him that "he only gave me ten" and that she "gotta wait I guess Friday." Pl.'s Ex. 58. In a later conversation between Defendant and John Ayala that same day, Defendant told John Ayala to call "the long haired guy" and ask what is going on because "the people have

already bought the stuff." Pl.'s Ex. 59A. Defendant further told John Ayala:

> Call him now. Ask him: What's up? Because it's been now, now, now . . . it's a lot of bull shit man. He's done it to me before . . . last time, you remember all the mess I made with all the people. They were waiting and spending a lot. This is no game for us to go back forth. You went over there and now back again. You understand me? Hey, be firm . . . I'm just getting on my way over there right now, but call him right now.

Pl.'s Ex. 59A.

While Kaowili did not specifically testify to the meaning of these conversations, he provided the much-needed context that he had purchased six pounds of methamphetamine on November 17, 2006, and was repaying Defendant for these drugs during this time. Without believing Kaowili's testimony linking Defendant to the methamphetamine, a jury may believe that these conversations were regarding the alleged legitimate debt that Kaowili owed Defendant.

In sum, the court finds that the withheld impeachment evidence is material to Counts 6, 11, and 12 because it places them in such a different light that it undermines the court's confidence in the verdict on these counts. *See Banks v. Dretke*, 540 U.S. 668, 701 (2004) (holding that suppressed evidence of a witness's

role as an informant was material where his testimony was the "centerpiece" of the prosecution's case and noting that had the evidence been disclosed, the jury "might well have distrusted [the informant' s] testimony, and, insofar as it was uncorroborated, disregarded it"); *see also Silva v. Woodford*, 279 F.3d 825, 854-55 (9th Cir. 2002) (holding that an evidentiary hearing was warranted on a *Brady* claim involving a deal with a witness whose "credibility was a critical issue, given that he was the only witness who could identify [defendant] as the trigger man"). Accordingly, the court GRANTS Defendant's Motion for a New Trial on Counts 6, 11, and 12 of the FSI.

2. ***Counts 1 and 7***

Turning to the remaining counts of the FSI, it appears that Kaowili's testimony played a much lesser role such that the withheld impeachment evidence is not material to Counts 1 and 7.

Count 7 charges Defendant with distribution of 50 grams or more of methamphetamine on or about March 23, 2007. After a careful review of all of the evidence, the court concludes that there is sufficient evidence to support conviction on this Count such that the withheld impeachment evidence is not material.

To put this Count in context, the government presented significant evidence that Defendant was heavily involved in the methamphetamine trade from Las Vegas to Oahu. For example, Oandasan, Nixon, and

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Costales all testified that they each sold methamphetamine and/or collected drug proceeds for Defendant. They each traveled to Las Vegas with these proceeds, where Defendant met them and collected the money. Doc. No. 588, Trial Tr. 2-194-200; Doc. No. 589, Trial Tr. 3-63-69, 3-151-52. Further, the government presented evidence that Defendant arranged to have methamphetamine packaged in cans for shipment to Oahu, and Nixon and Oandasan testified that they received, and FBI recovered, methamphetamine packaged in this fashion. Doc. No. 588, Trial. Tr. at 2-124-31, 2-187-88; Doc. No. 589, Trial Tr. 3-147; Pl.'s Exs. 26-31, 35A.

Regarding the specific March 23, 2007 transaction, Tabanera testified that Kaowili introduced him to Cruz as Kaowili's cousin so that Tabanera could purchase one pound of methamphetamine. Tabanera testified that he met Cruz on March 14, 2007, but because the "chickens" (as Cruz referred to it), had not arrived yet, they had to meet again on another day. Doc. No. 590, Trial Tr. 4-148-49.

Kaowili then had a series of conversations with Cruz and Defendant during the evening hours of March 19, 2007. In the first conversation, Cruz tells Kaowili to speak with "Uncle," Defendant's nickname:

> Cruz: (unintelligible) . . . alright-alright, here we go, OK, you know what, um, I would like you talk to uncle you know that way (unintelligible) we clear, make it clear, that shit, you know what I mean? And

then um, especially, explain him everything, you know, explain him what's up and everything, you know, that's all I want and after-after-after he pau talk to you, he going to call me back, then I call you back, oh (unintelligibly) to you, OK?

Kaowili: OK.

Ex. 69.

Kaowili then spoke with Defendant about his earlier conversation with Cruz and introducing his "cousin" (Tabanera) to Cruz. Defendant then confirmed that they would "fight chickens" on Wednesday:

Defendant: . . . . so do you want to still fight roosters?

Kaowili: Yeah, yeah. (unintelligible) I told them the plan, and I told him you know now now, I spoke to you cousin down here about how we going to fight chicken and he kinda agrees with it, I going to purchase one, I going to introduce, introduce him to my cousin, and from there, we going to work things out from there, instead of me, you know, you know what I mean?

Defendant: Yeah?

. . .

Kaowili: I got to build, because I, I, I like be, I going to be involved, but I going to be out of sight, I going to overlook the situation, you know what I mean?

Defendant: Um hum.

. . .

Defendant: Go, go and talk, yeah go and talk to him, and you guys define the plan how you going to fight the chickens, and then he's going to let me know, you know, and um, I, I'm here, I take care of them here, I doing my part here, you know like now we going to be straight um, you know any problem understand, you call me this phone, right now here, that you have right now, call me up, it's going to be um, only in like night time.

Kaowili: Oh, night time, this number?

Defendant: Yeah, like night time I either call you, you know, after, after six seven from here you can call me, because I want to keep it off in the daytime, and you know.

Kaowili: OK, OK, I talk to him, I don't know (unintelligible) um are we still fighting the um chickens on Wednesday, or the derby got delayed?

Defendant: Wednesday is (unintelligible) yeah, yeah, should be (unintelligible) or like, I believe it going to be Wednesday. Talk to him tomorrow, you guys can talk to that cousin, and I can, I going to go talk to him, and then from, from that you guys can just, you know, decide what you guys going to do there.

Pl.'s Ex. 70.

After Kaowili spoke with Defendant, later that evening, Cruz called Kaowili and left the following message confirming that they would "buy some chickens" on Wednesday:

Cruz: Hey bro, I think that everything is-is alright now, I mean um, I mean you talked to him already so it's going to be cool, so um, I give you a call Wednesday to see what's up, OK? Let see if we go buy some chickens or something . . . .

Pl.'s Ex. 71.

On Wednesday, March 21, 2007, Cruz and Kaowili met, just as Defendant and Cruz had confirmed in their previous conversations with Kaowili. Cruz, however, had to delay the "fight" due to "trouble" in Mexico and therefore rescheduled for Friday at the Zippy's restaurant in Wahiawa, Oahu:

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Cruz: Um. We being here lately, we have a little trouble because you know, that they fucked up in Mexico. You know, the government.

Kaowili: Uh.

Cruz: (unintelligible) like I said. But uh, the deal right now is that the thing is on the way now.

Kaowili: No kidding. Okay.

Cruz: It's on the . . . it's on the way of for you now. Okay so, I just going call you. Uncle told me, he will talk . . . calling you . . .

. . .

Kaowili: So where we going fight, though? When we going fight with Larry?

Cruz: Saturday. Uh Friday. Friday for sure.

Kaowili: For sure.

Cruz: But the other hundred percent, for sure Friday.

Kaowili: No meet someplace else or you know too much time.

Cruz:	Okay. Okay, I know. So what we gonna do.
Kaowili:	So I going call you, and I . . .
Cruz:	Let's meet at Zippy's Wahiawa.

Pl.'s Ex. 72.

Any doubt existing as to the meaning of these phone conversations -- that is, whether they relate to a drug deal or a chicken fight -- was lifted when Cruz met Tabanera on Friday, March 23, 2007 at the Zippy's Restaurant in Wahiawa to sell him one pound of methamphetamine. Doc. No. 590, Trial Tr. 4-151-54; Pl.'s Exs. 43, 44A, 74. That Cruz in fact sold methamphetamine (and not a chicken) provides clear context to the conversations leading up to the drug transaction, regardless of whether the jury accepted Kaowili's explanation of the conversations. In other words, the conversations of March 19, 2007 led directly to the events of March 23, 2007 and thus these conversations necessarily involved the sale of methamphetamine. Nixon further corroborates this conclusion by confirming that the one pound of methamphetamine sold by Cruz on March 23, 2007 was obtained from Defendant. She was aware that Cruz had obtained two pounds of methamphetamine for distribution, and wanted to obtain both pounds for her further distribution, but was told by Cruz that "Uncle" told him to sell one pound to Kaowili. Doc. No. 589, Trial Tr. 3-156-57.

This evidence connects Defendant to the March 23, 2007 methamphetamine transaction in a concrete and direct manner such that Kaowili's testimony was unnecessary to the jury's verdict on this Count. While Kaowili explained the phone conversations between himself and Cruz and Defendant, given the context of these conversations and all of the evidence presented, no explanation by Kaowili was necessary to tie Defendant to this transaction. Accordingly, given the abundant evidence explained above, the withheld impeachment evidence is not material -- that is, there is no reasonable probability that disclosure of the impeachment evidence would have changed the jury's verdict as to Count 7.

Finally, the court finds that the withheld impeachment evidence is not material to Count 1 of the FSI, conspiracy to possess with intent to distribute and to distribute methamphetamine. Beyond the evidence regarding Defendant's involvement with the March 23, 2007 transaction, the government presented significant evidence separate from Kaowili's testimony regarding Defendant's involvement in the drug business, including (1) Tufele's testimony that he canned methamphetamine on two separate occasions in Las Vegas for Defendant, *id.* at 2-124-31; *see also* Pl.'s Exs. 2 (rental agreement for storage unit), 21 (flight information for Tufele); (2) Oandasan's and Nixon's testimony that they received methamphetamine through the mail which was packaged in metal cans, *id.* at 2-187-88; Doc. No. 589, Trial Tr. 3-147; (3) Oandasan's, Nixon's and Costales' testimony that they each traveled to Las Vegas to

transport money to Defendant from the sale of the drugs, Doc. No. 588, Trial Tr. 2-194-200; Doc. No. 589, Trial Tr. 3-63-69, 3-151-52; Pl.'s Exs. 23 (flight information for Oandasan, Costales and Nixon), 25 (hotel information); (4) Oandasan's testimony that Defendant came to Oahu in September 2006 for less than 24 hours to collect money, Doc. No. 588, Trial Tr. 2-201-02; Pl.'s Ex. 23 at 81, 83 (flight information for Defendant); (5) Nixon's testimony that Defendant assured her that he would make sure she still received methamphetamine to sell after she was short on payment, Doc. No. 589, Trial Tr. 3-151-52; and (6) evidence that Defendant was aware that he was under surveillance. Doc. No. 589, Trial Tr. 3-162-63; Doc. No. 590, Trial Tr. 4-55; Pl.'s Ex. 61.

While Tufele, Oandasan, Nixon, and Costales were impeached to some degree, their testimony was corroborated with evidence and they presented a consistent story that Defendant was in charge of the Las Vegas operation of sending methamphetamine to Oahu. Kaowili's testimony regarding the November 17, 2006 and March 23, 2007 transactions was not necessary for conviction on this Count of the FSI.

In sum, because the withheld impeachment evidence does not undermine the verdict on Count 1 and 7, the court DENIES Defendant's Motion for a New Trial on these Counts.

V. CONCLUSION

Based on the above, the court GRANTS in part and DENIES in part Defendant's Motion for a New Trial. Defendant is granted a new trial on Counts 6, 11, and 12 of the First Superceding Indictment, and his conviction on Counts 1 and 7 still stand. The court will schedule a status conference with the parties to discuss the next steps in light of this Order.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, April 2, 2009.

/s/
J. Michael Seabright
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 17, 2010

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-10286

D.C. No. 1:07-cr-00268-JMS-1
District of Hawaii, Honolulu

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

NELSON GAITAN-AYALA,

Defendant - Appellant.

ORDER

Before: B. FLETCHER, PREGERSON and CLIFTON, Circuit Judges.

Defendant-Appellant's Motion for Reconsideration is DENIED.

Judges H. Pregerson and Clifton have voted to deny the petition for rehearing *en banc* and Judge B. Fletcher so recommends.

Appendix C

The full court has been advised of the petition for rehearing *en banc* and no judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35.

The petition for rehearing *en banc* is DENIED.